NO. 48622-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES VORHIES,

Respondent,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,

Appellant

RESPONDENT'S REPLY BRIEF

Wayne L. Williams, WSBA# 4145
Attorney for Respondent

Williams, Wyckoff & Ostrander, PLLC
P.O. Box 316
Olympia, Washington 98507
(360) 528.4800

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I. THE DEPARTMENT OF RETIREMENT SYSTEMS CANNOT CHANGE THE FINAL ORDER

We understand the Department of Retirement Systems' (DRS) role is to defend the Findings of Fact, Conclusions of Law and Final Order entered by the Presiding Officer. However, DRS seems unable to resist attempting to improve the Final Order's findings to support its position.

For example, DRS described Mr. Vorhies' physical activities by saying "He also mows the lawn, though he admits mowing takes him longer to complete than it used to." (Brief of Appellant, p. 10) The actual Finding is that:

> In season, he mows the lawns at his house and his parent's house, using his father's riding lawnmower with hydraulically-controlled power steering. This takes about three hours in total, and intensifies pain in his back and neck, so he does it up to an hour per day over several days, and only when necessary, which he testified is less often than weekly. FOF 46 (AR-13)[1]

DRS says "Additionally, Mr. Vorhies continues to drive his automatic-transmission car for several hours at a time,

[1] "FOF" refers to the Findings of Fact in the Department's Final Order. "COL" refers to the Conclusions of Law in the Final Order. The Final Order is in the administrative record filed with this Court at CAR 1 – 49. The administrative record is designated "AR" and the clerk's papers are "CP." (Brief of Appellant, p. 5)

and occasionally drives his 1967 manual-transmission truck for errands." (Brief of Appellant, p. 10) The actual Finding is that:

> He drives his automatic-transmission car, and sometimes his 1976 manual-transmission pickup truck, to run limited errands in the local area, but does only minimal shopping by himself, such as picking up prescriptions or a few items for dinner. FOF 46 (AR-13)

The DRS' heading on page ten, is "4) Mr. Vorhies was able to testify for over two hours without apparent distress." The Final Order found that:

> At hearing the undersigned took Mr. Vorhies' testimony for well over two hours, with one approximately 10-minute break. During direct examination, referring to the constant pain in his neck, he stated, 'Right now it's hurting me pretty good'. FOF 51 (AR-14)

DRS asserts that experts for both parties and Mr. Vorhies' doctor agreed on Mr. Vorhies' physical capabilities, citing Findings of Fact 42, 61 and 66. However, it is instructive to note that the Final Order does not totally accept the limitations from the 2013 physical capacities evaluation (PCE).

The actual Conclusion was:

> Because the 2013 PCE report specifies that these results are based on high-effort performance, that weight handling capacities are on a less-than-reasonably continuous basis, and that Mr. Vorhies would be precluded from the full

range of light duties, it would be reasonable to expect that Mr. Vorhies would not be able to perform all these activities at their maximum limits throughout every work day, but could sustain them at somewhat reduced levels. These limits on physical activities describe Mr. Vorhies' disability for WAC 415-104-482(1)(c). (Emphasis supplied) COL 46 (AR-42)

The Final Order also concluded that:

Alternately walking, standing and sitting, he has the physical capacity to engage in income-producing activity for less than five hours a day in a standard five-day work week, the most that would be required at the lowest wage. (Emphasis supplied) COL 53 (AR-44)

The Final Order also found:

In an addendum [to the PCE] of August 28, 2011, Ms. Casady expanded on her opinion that Mr. Vorhies would not be able to sustain gainful vocational activity on a reasonably continuous basis, pointing out that he showed 'below-competitive productivity levels on work sample activity', had shown poor body mechanics and posture (a safety concern), needed to frequently change positions, was using narcotic medications daily for pain control, 'demonstrates significant limitations of the left arm and hand', and had a history of migraine headaches. FOF 37 (AR-10)

II. THE FINAL ORDER FINDS PAIN IS REAL, BUT DOES NOT TAKE IT INTO CONSIDERATION

Conclusion of Law 40 says:

Mr. Vorhies experiences constant neck pain. According to Dr. Crim, Mr. Vorhies' pain intensity is not static, but will 'wax and wane depending on a variety of factors', with 'good days and bad days'; overall, the general condition of his cervical spine is likely to deteriorate; and it is not reasonable to expect that Mr. Vorhies will be pain free, but it is a reasonable goal to have pain that is manageable. Dr. Crim accepts Mr. Vorhies' descriptions of the intensity of his pain because they are consistent with his own observations of Mr. Vorhies, both in clinic and in other settings in the Sequim area.[2] (Emphasis supplied) COL 40 (AR-40)

The Final Order finds that:

At the hearing in December 2013 Dr. Crim testified with respect to Mr. Vorhies' neck conditions, as follows:

He diagnosed post-surgical arthritis causing bone spurring on top of early-onset (likely genetic and pre-existing) osteoarthritis, also causing bone spurring; and intervertebral disk disease at the C5 vertebra. He opined that the first cervical spine injury occurred at the police academy, in line with the opinion of the neurological specialist to whom Mr. Vorhies was first referred in 2006.

The effects of these conditions are chronic pain in Mr. Vorhies' neck and shoulder from narrowing of passages for nerves, and shoulder pain corresponding to disk disease at C5; and secondary effects of chronic pain, such as anxiety, depression and high blood pressure. Though Mr. Vorhies' experience of pain intensity

[2] The Final Order accepted this testimony over any inconsistent prior opinions. COL 43 (AR-41)

> varies, overall Dr. Crim believed Mr. Vorhies' pain is worse since January 2011; an MRI scan done in August 2012 showed continued worsening of the disk disease and arthritic conditions. Dr. Crim thought Mr. Vorhies' reports of pain credible, consistent with his own observations of Mr. Vorhies over time, in the clinic and around town, and with imaging studies and specialists' reports.
>
> Dr. Crim has not ruled out further treatment for Mr. Vorhies. Though chronic pain and its secondary effects are treatable, he was uncertain how effective treatment will be in Mr. Vorhies' case. Medications were prescribed for sleep, blood pressure, nerve pain and anxiety, and 'breakthrough pain'; Mr. Vorhies also used non-prescription anti-inflammatory medications for pain; his blood pressure was under good control as a result of prescribed medication and cessation of smoking. A soft cervical collar was being tried to support the neck area. Dr. Crim recommended physical therapy for spinal strengthening, but, for safety reasons, only as prescribed by specialists in neurology or physical therapy because of spinal instability. He has suggested a trial of acupuncture for pain relief. He expected that Mr. Vorhies will need neck surgery again, but nerve conduction studies would be required first to rule out other causes of pain. (Emphasis supplied) FOF 41 (AR-12)

Obviously, pain and its secondary effects are a big part of the picture of Mr. Vorhies' disability. However, in assessing the meaning of "disability" the Final Order adopted a definition as follows:

1. The inability to perform some function; esp. the inability of one person to alter a given relationship with another person. 2. An objectively measurable condition of impairment, physical or mental, esp. one that prevents a person from engaging in meaningful work <his disability entitled him to workers' compensation benefits>. Also termed *incapacity* or *handicap.* (Emphasis supplied) COL 26 (AR-33)

The Final Order said:

A disability benefit applicant, and close family members, are generally not in a good position to objectively measure the applicant's capabilities; what he *can* and *cannot* do must be assessed more objectively. (Emphasis supplied) COL 41 (AR-40)

The Final Order said:

As far as this record shows, the only objective measurements of what Mr. Vorhies can and cannot physically do comes from the PCE's of 2011 and 2013. (Emphasis supplied) COL 44 (AR-41)

The Final Order noted that Ms. Berndt, whose opinions it adopted: ". . . did not give any independent consideration to the effects of Mr. Vorhies' reported pain." FOF 67 (AR-22)

Mr. Vorhies' pain is real and unrelenting. It cannot reasonably be labeled as not "objective" and ignored.

III. FINAL ORDER IS NOT AN AGENCY INTERPRETATION

DRS, in arguing that the court should give deference to its interpretation, is apparently arguing that whatever the Presiding Officer says, by way of a Conclusion of Law, is DRS' interpretation of that statute or rule. However, the Presiding Officer was not delegated the authority to interpret the laws that DRS administers. That is the purview of the Director. RCW 41.40.020, RCW 41.50.030 and RCW 41.50.020.

It is interesting that DRS cites, as authority for the proposition that deference should be given to it's interpretation of the law it administers, the case of Shaw v. Department of Retirement Systems, 193 Wn.App 122, 371 P.3d 106 (2016) a case in which this court overruled and reversed a legal determination in a Final Order from a LEOFF 2 disability retirement case.

We can agree that the WAC provisions that DRS has formally adopted are interpretations of laws. What we have argued, and what is manifest in this record, is that the Final Order misapplied or failed to apply DRS own rules, to the facts found in the Final Order.

The Department of Labor and Industries (DLI) uses rules very similar to DRS rules to consider employability and gainful employment. Even the Final Order notes the close connection between DRS and DLI definitions as follows:

> It is noted that two definitions, WAC 415-1 04-482(13)(c), "labor market", and (13)(f), "transferable skills", closely resemble definitions in chapter 296-19A WAC, which covers vocational rehabilitation services available through DLI, and could be derived from those workers' compensation regulations.

LEOFF	**Workers' Compensation – Vocational Rehabilitation**
WAC 415-104-482(13)(c) (2009)	WAC 296-19A-010(4) (2004)
(c) **Labor market** is the geographic area within reasonable commuting distance of where you were last gainfully employed or where you currently live, whichever provides the greatest opportunity for gainful employment.	(4) **What is an injured worker's labor market?** Generally, the worker's relevant labor market is the geographic area where the worker was last gainfully employed. The labor market must be within a reasonable commuting distance and be consistent with the industrially injured or ill worker's physical and mental capacities.
WAC 415-104-482(13)(f)	WAC 296-19A-010(7)
(f) **Transferable skills** are any combination of learned or	(7) **What is a transferable skill?** Transferable skills are any combination of

demonstrated behavior, education, training, work traits, and skills that you can readily apply. They are skills that are interchangeable among different jobs and workplaces.	learned or demonstrated behavior, education, training, work traits, and work-related skills that can be readily applied by the worker. They are skills that are interchangeable among different jobs and workplaces. Nonwork-related talents or skills that are both demonstrated and applicable may also be considered.

Footnote 34 (AR-29)

It is notable that DLI's definition of transferable skills specifically includes "Nonwork-related talents or skills that are both demonstrated and applicable may also be considered." The DRS rule does not contain this language. Ironically, the Final Order praises Ms. Berndt for "including skills acquired through activities other than paid employment" and criticized Ms. Larson for apparently limiting her consideration to employment skills. COL 58 (AR-46)

Since DLI and DRS are applying almost identical definitions to make employability determinations, it makes no sense to ignore workers' compensation precedent.

IV. WORKERS' COMPENSATION LAW IS HELPFUL

DRS argues that:

> Even if workers' compensation law applied to the present situation, Mr. Vorhies provided only speculation as to whether he could 'obtain' employment. (Brief of Appellant, p. 22)

However, as the Final Order found, Ms. Larson's ultimate opinion was contained in the following exchange:

> Q: Okay. Now, in this particular case, we have agreed, I believe, that substantial gainful employment is employment that would allow you to earn more than $1040 a month. Operating on that assumption and based upon Mr. Vorhies' age, education, transferable skills, and work experience, as well as the physical limitations he has, can you form an opinion on a more probable than not basis as to whether he's capable of obtaining and performing substantial gainful employment from January 1, 2011, forward?
>
> A: Yes.
>
> Q: And what is your opinion?
>
> A: That given his work as a policeman, his work experience, his transferable skills, and his physical capacities, he is not able to obtain employment and meet the requirement for substantial gainful activity. FOF 62 (AR-17)

The Final Order found that Ms. Larson had testified that Mr. Vorhies could not obtain gainful employment in the clerical sector. FOF 62 (AR-18) The Final Order found that Ms. Larson

had testified that Mr. Vorhies could not obtain and perform jobs in a substantial variety of occupations. FOF 62 (AR-18)

Finally, the Final Order found that Ms. Larson testified:

> Q: Are there jobs, other than the ones we've talked about, that you feel Mr. Vorhies could obtain and perform given the factors I mentioned before, his work experience, his training, his age, his education, his physical limitations?
>
> A: No, I don't believe that there is [sic].
> FOF 62 (AR-19)

V. MR. VORHIES HAS NOT BEEN "REINVENTED"

DRS describes one of the issues for your decision as follows:

> **Issue 8:** Under the error of law standard governing APA judicial review, did the Department correctly conclude that it has authority to determine how greatly to weigh a claimant's existing skillset and ability to acquire additional skills when deciding a claimant's eligibility for a LEOFF Plan 2 "catastrophic disability" benefit? (Vorhies' Assignment of Error 2). (Emphasis supplied) (Brief of Appellant, p. 3)

DRS argues that Mr. Vorhies has the ability to "reinvent himself" so he must be denied benefits.[3] Again, as we

[3] If, at some future date, Mr. Vorhies could "reinvent" himself, through additional training or physical improvement, his total duty disability benefits could be converted back to line-of-duty disability retirement. RCW 41.26.470(9).

have said in our opening brief, this is an argument directed not at who he is and what he can do now, but what he might be able to do at some future date with some additional training, education or experience. This, in turn, is inconsistent with the Final Order's conclusion that:

> Therefore for this order Mr. Vorhies' ability to engage in any other kind of substantial gainful activity in the labor market under WAC 415-104-482(1)(c) has been evaluated as of the time of the hearing, rather than only when he separated from his City employment or when he applied for disability retirement. (Emphasis supplied) COL 39 (AR-40)

The DRS' theory apparently is if you have had a variety of jobs in your career, and been successful in them, then no amount of physical disability or pain can prevent you from "reinventing yourself" into some different but sedentary job that you might be able to possess if you had the physical ability.

VI. MR. VORHIES' DAILY ACTIVITIES ARE VERY LIMITED

DRS argues that Mr. Vorhies' daily activities demonstrate his ability to obtain and perform substantial gainful activity. However, Mr. Vorhies is a man about whom the Final Order found that:

> During a typical week day, he watches television most of his waking hours, usually from a sofa or

> recliner in the living room of his home; he will often walk once or twice to his parent's house, a distance of approximately 100-200 feet, where he also watches television from a recliner. At home he performs light housekeeping such as preparing a simple dinner, which may include using a barbeque or smoker, 15 minutes or so of kitchen cleanup, and using the automatic washer and dryer at home to do his personal laundry as needed. FOF 46 (AR-13)

DRS transforms these activities of daily living into substantial gainful activity as follows:

> Thus, these abilities that Mr. Vorhies displays on a daily basis, from walking to his parent's house to operating a vehicle, demonstrate that a job identified by Ms. Berndt, such as one who cleans cars, is certainly within the realm of Mr. Vorhies' physical capabilities. (Brief of Appellant, p. 26)

Bear in mind, that this is a gentleman who the Presiding Officer found can ". . . only seldom to occasionally climb ladders, or twist or turn or bend his neck." COL 46 (AR-41)

The seldom level is five percent of a day, or 24 minutes. (Exhibit A-15, p. 3) Even ignoring his other limitations, it is difficult to imagine how Mr. Vorhies could successfully act as a car cleaner, if he can only twist, turn or move his neck 24 minutes in a day.

VII. THE VOCATIONAL TESTIMONY WAS WEIGHED USING AN ERRONEOUS LEGAL INTERPRETATION

The Final Order did not find that Ms. Berndt was more credible than Ms. Larson. Rather, it rejected Ms. Larson's testimony because she considered whether Mr. Vorhies could obtain and reasonably perform employment. The Final Order rejected Ms. Larson's opinion because Ms. Larson was, as it said, "confused as to the legal standard applicable." As the Final Order described it:

> This confusion was most apparent where Ms. Larson opined on Mr. Vorhies' ability to be 'competitive' in his labor market, or to 'obtain' competitive employment. These are not express requirements for a catastrophic disability benefit, but appear to have been assumed or tacitly added by Ms. Larson to serve Mr. Vorhies' theory of the case. Under WAC 415-104-482(1)(c), the primary concern is with an applicant's ability to engage in income-producing activity; making that requirement so much more specific, tying it to an applicant's ability to obtain, or perform the essential functions of, a particular position or type of position, would alter the pertinent eligibility requirements as well as the burden of proof. The test does is not whether an applicant can obtain any specific kind of work, only whether he can engage in some kinds of work that are available in his labor market. (Emphasis supplied) COL 55 (AR-45)

Were it not for this fundamental mistaken view of the law, Ms. Larson's opinion would have been accepted and Ms. Berndt's would have been rejected. Ms. Berndt did not even consider whether Mr. Vorhies could obtain or perform any of the jobs she listed, simply that he could apparently "engage in those jobs."

VIII. MARLER CASE IS NOT CONTROLLING

The assertion that Marler v. Department of Retirement Systems, 100 Wn.App 494, 997 P.2d 966 (2000) has any application to this case is misplaced. PERS 1 required an application for disability benefits to be filed within two years of April 23, 1990. Mr. Marler argued that he felt he could work in some limited capacity prior to March 1, 1993, and therefore was not totally disabled until that date. The court held that "There was no authority or hint of legislative intent that the two-year statute of limitations should begin to run only when an employee subjectively believes that he or she no longer has the capacity to work." Marler, supra., p. 500. The court upheld the Director of DRS' order, on page 502 of their opinion.

By way of *dicta*, the court then discussed Mr. Marler's argument that to be "totally incapacitated" under PERS 1

is the same as being "permanently totally disabled" under workers' compensation. He asserted that the Labor and Industries determinations on his workers' compensation claim were binding on DRS. However, as is abundantly clear, there was no identity of subject matter, cause of action, or persons or parties. In fact, DRS had no participation, whatever, in the workers' compensation matter.

To argue from that case that it is irrelevant whether an injured person can actually obtain and successfully perform a job when determining whether they can perform substantial gainful activity, is quite a stretch.

IX. BOTH THE ABILITY TO ENGAGE AND TO EARN MUST BE CONSIDERED

The fundamental object of both the workers' compensation system[4] and DRS' disability system is to provide total disability benefits to those who have lost earning power. In LEOFF, earning power must sink below a certain dollar amount for a member to receive total disability benefits. RCW 41.26.470(9).

[4] Hubbard v. Department of Labor and Industries, 140 Wn.2d 35, 992 P.2d 1002 (2000); Franks v. Department of Labor and Industries, 35 Wn.2d 763, 215 P.2d 416 (1950) RCW 41.26.

DRS seems to suggest that Mr. Vorhies is requesting the court to apply the workers' compensation "odd-lot doctrine." However, that is not even an issue in this case.[5]

DRS' final argument seems to be that because it did not mention workers' compensation case law in its administrative code provisions, DRS is forbidden to consider those cases, even by analogy, because the express mention of one thing implies the exclusion of another.

However, that same thinking would apply to such rules as proximate cause, sole causation, and any variety of other legal doctrines which have been adopted by case law over the years, and which are helpful in a variety of legal contexts.

X. MR. VORHIES CANNOT PERFORM PAST JOBS OR OFFICE WORK

The Final Order concludes:

> *Education and experience* Mr. Vorhies' education and work experience are somewhat limited. His formal education does not extend beyond high school, and the content of his later training for law enforcement work is not known.

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[5] If DRS had produced evidence, in this case, that Mr. Vorhies had been offered a job, within his physical limitations, which would have paid him the requisite amount and he had refused the job, I suspect that the Presiding Officer would have felt that evidence merited consideration. However, no such evidence was produced in this case.

> His work experience as a building painter, nuisance wildlife trapper, mechanic and equipment operator/driver, and narcotics detective all required physical work at levels higher than the light to sedentary level that this record indicates he now can do. His education and work experience have not equipped him with significant clerical skills or even medium proficiency with computer software that would easily suit him for general office work. Thus the focus shifts to his transferable skills. COL 48 (AR-42)

In short, the Final Order concludes Mr. Vorhies cannot return to any occupation in which he has experience. It then concludes he cannot engage in employment as a general office worker.

The Final Order concludes his transferable skills are as follows:

> He has skills in customer service, negotiation, working on a team or collaboratively with others, mechanical, troubleshooting and problem-solving, estimating and bidding painting jobs (structures), performing basic mathematical calculations, billing, collecting payment and money transactions, record keeping, observation, investigation and interviewing, abiding by and enforcing rules and regulations, and knowledge of Clallam and Jefferson counties and of tools and construction equipment and methods.
>
> Additional behaviors or work traits that Mr. Vorhies has demonstrated in work and hobby

activities are creativity, a strong work ethic and the ability to learn quickly. COL 48 (AR-43)

These are all admirable qualities and skills, but to be determinative, they have to have some practical application to an actual job, with very limited physical requirements, that does not involve general office work.[6] By focusing on the word "engage" to the exclusion of whether a member can "obtain" or "perform" a job, the Final Order ignores the member's inability to "earn." Substantial gainful activity is defined in terms of earnings in the DRS regulation. WAC 415-104-13(b) and (d).

Why are the abilities to obtain and perform important? If we look only at the physical activity say of a reception / information clerk[7] we know:

1. Mr. Vorhies can sit for one and a half hours at a time intermittently up to five hours in an eight hour day. COL 46 (AR 41-42)

2. Mr. Vorhies did some desk work at the police department. FOF 11 (AR-4)

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[6] This is consistent with Ms. Larson's testimony that Mr. Vorhies could not work in the clerical sector. FOF 62 (AR-17)

[7] This job is just used as an example and is probably precluded by COL 48 (AR-42)

3. He can use Microsoft Word to create documents and Microsoft Excel to create and use spreadsheets. FOF 48 (AR-13)

4. He did minimal filing at the police department. FOF 12 (AR-4)

5. He can send and receive email and search the internet. FOF 48 (AR-13)

Clerk work can be substantial gainful activity, and considering just the facts, above, one would find Mr. Vorhies is capable of engaging in that activity. However, for activity to be gainful, it must produce earnings. Therefore, Mr. Vorhies would have to obtain and successfully perform the job duties. Additional facts now come into play, including the following:

1. The PCE results for sitting are limited to a chair with cervical and upper extremity support. (Exhibit A-15, p. 3; Exhibit A-17, p. 3)

2. If the job allowed him to alternately walk, stand and sit, he could only do so less than five hours a day. COL 53 (AR44)

3. He can only twist or turn or bend his neck one to five percent in of eight hour day. FOF 35 (AR-10)

4. "His attention pattern is to focus on only one thing at a time, so he doubts his ability to multitask, or effectively manage more than one task at a time." FOF 53 (AR-15)

5. He cannot "touch" type. He uses one finger of each hand. FOF 49 (AR-14)

6. He can only type 15 words per minute. FOF 61 (AR-17)

7. He experiences constant neck pain which waxes and wanes depending on a variety of factors. COL 40 (AR-40)

8. When he reads, he uses his lifted knees to hold the reading material while he is in a reclining position to avoid flexing his neck downward. FOF 50 (AR-14)

When one considers all the facts, Mr. Vorhies might physically be able to "engage" in substantial gainful activity, but who would hire him? Who would continue to employ him? How would he have earnings?

XI. CONCLUSION

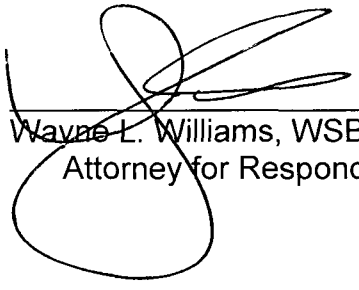
DRS has shown that a hyper-technical interpretation of RCW 41.26.470 is possible. They have failed to explain why the legislature would want to treat Mr. Vorhies and other first responders, who have been injured in the line of duty, so meanly. This is especially baffling when one considers that pension laws

are to be "liberally construed most strongly in favor of the beneficiaries." Hanson v. City of Seattle, 80 Wn.2d 242, 247, 493 P.2d 775 (1972).

The Final Order must be reversed and Mr. Vorhies be granted total duty disability benefits.

DATED this 12th day of October, 2016.

WILLIAMS, WYCKOFF &
OSTRANDER, PLLC



Wayne L. Williams, WSBA# 4145
Attorney for Respondent

CERTIFICATE OF MAILING

I, Heather Wulf, hereby certify that a true and correct copy of Respondent's Reply Brief, was mailed and emailed on this date to each of the following:

Anne Hall
Troy Klika
Office of the Attorney General
P.O. Box 40123
Olympia, Washington 98504-0108
AnneH@atg.wa.gov
TroyK@atg.wa.gov

DATED this 12th day of October, 2016.

Heather Wulf